1. Prior Express Invitation or Permission

The Commission solicits comment on the need to clarify the definition of "prior express invitation or permission" as it relates to unsolicited faxes. As an initial matter, the states support the Commission's finding in its 1995 Reconsideration Order that publishing or releasing a facsimile number, such as in a directory, does not constitute express consent to receive a fax advertisement.[101] With respect to the particular issue of membership in a trade association, while such membership may be consent to receive information from the association, it is not express permission to receive unsolicited fax advertisements. If association members do wish to receive fax advertisements, perhaps the association can maintain a separate list of those fax numbers to provide to advertisers.

Approaching the "express consent" issue on a case-by-case basis can be costly and time-consuming, as consent is the main defense fax advertisers claim. An ambiguous concept of express invitation encourages fax advertisers to devise ways of circumventing the TCPA by deceptively obtaining what fax advertisers call "consent." For example, Fax.com, Inc. has sent recipients a fax headlined "Your Permission Please." The message then stated that Fax.com is "asking you to help by receiving fax alerts that are finding missing children nationwide" and to offset the cost of these alerts, Fax.com will also be faxing advertisements. The fax further stated that recipients will continue receiving faxes from Fax.com unless they opt-out. To reduce the necessity of relitigating this question in every case, a concrete definition of "express" from the Commission would be helpful. The definition should make it clear that "express" means definite, explicit, or direct, and not left to inference. The Commission should also reinforce that a negative option does not create express permission or invitation.

In a related matter, it should be the sender's responsibility to maintain evidence of consent by recipients. It has been the states' experience in litigating TCPA cases that large-scale fax advertisers will claim that some recipients consented to the faxes but they have no records to prove consent.

2. Established Business Relationship

The Commission seeks comment on whether an established business relationship establishes consent to receive fax advertisements and whether the Commission should expressly provide for such an exemption. The Attorneys General respectfully submit that creating an established business relationship exemption runs contrary to the clear wording of the statute. The TCPA defines "unsolicited advertisement" as an advertisement sent to a person "without that person's prior express invitation or permission."[102] A business relationship exemption would rely on ***implied*** invitation or permission, which is contrary to the clear wording of the statute. That an existing business relationship is distinct from "express invitation or permission" is demonstrated by the subsection of

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[101] 1995 TCPA Reconsideration Order, 10 FCC Rcd 12391,737 (1995)

[102] 47 U.S.C. § 227(a)(4)

the TCPA immediately preceding the "unsolicited advertisement" subsection. In defining a "telephone solicitation," the TCPA establishes distinct exemptions for calls with "express invitation or permission" and calls from a person "with whom the caller has an established business relationship."[103] One should assume in construing a statute that words are not superfluous.[104] Therefore, "express invitation or permission" must have a meaning beyond that found in "established business relationship." Moreover, consecutive subsections of a statute simultaneously enacted should be read consistently.[105] Therefore, the fact that an "established business relationship" exemption is found in the "telephone solicitation" definition but ***not*** in the "unsolicited advertisement" definition means that missing exemption for an established business relationship should not be added by courts or the Commission to the "unsolicited advertisement" definition. For the reason that an "established business relationship" exemption for unsolicited faxes is contrary to Congress' intent, the states are opposed to the Commission providing such an exemption.

3. Fax Broadcasters

The Commission seeks comment on whether it should specifically address the activities of "fax broadcasters." Fax broadcasters that maintain their own databases of fax numbers are the subjects of the vast majority of consumer complaints and state enforcement actions. The states support the Commission's finding that fax broadcasters who determine content of the advertisement or its destination are considered senders within the meaning of Section 227(b)(1)(C), rather than merely being disinterested fax broadcasters, and therefore the fax broadcasters can be held liable.[106] The rules should be amended to explicitly note this distinction. Furthermore, a definition of "common carrier" added to the rules would also help alleviate confusion about the status of entities transmitting faxes

The rules should also specify particular activities that would expose a fax broadcaster to liability. The list should include sending unsolicited commercial faxes to a fax broadcaster's own database of fax numbers. Moreover, a fax broadcaster that sends to a database provided by someone else should seek documented reasonable assurances from that provider that the recipients have consented to receiving the faxes, or the broadcaster is also liable.

The Commission seeks additional comment on whether its rules requiring fax advertisements to identify the entity on whose behalf the message is sent have been effective in protecting consumers' rights to enforce the TCPA. Although requiring the ***advertiser's*** identity is helpful, not

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[103] 47 U.S.C. § 227(a)(3)(A) and (B)

[104] *TRW Inc. v. Andrews*, 534 **U.S.** 19, 31 (2001).

[105] ***Erlenbaugh*** *v. United States*, 409 U.S. 239, 243-45 (1972); *U.S. West Communications* ***v. Hamilton,*** 224 F.3d 1049, 1053 (9th Cir. 2000)(observing that when statutes are "enacted at the same time **and** form part of the same Act, the duty to harmonize them is particularly acute").

[106] *Far.com,* FCC02–226, Notice of Apparent Liability for Forfeiture, ¶¶13-14 (August 7,2002)

requiring identity information for the ***sender*** has been a hindrance. It has been the states' experience that fax broadcasters, who maintain their own databases and send others' advertisements to these fax numbers, frequently omit their identifying information as the sender in order to avoid detection and enforcement action. The states request that the Commission reconsider its previous position that the requirement of identifying information applies only to the originator of the message and not the transmitting entity.[107] In the situation where the transmitting entity, or fax broadcaster, determines the destination of the fax advertisement, that entity should also be required to include its identifying information on the fax, and the rules should be amended to reflect that requirement.

B. AUTODIALERS AND PRERECORDED MESSAGES

The Commission seeks comment on autodialers and prerecorded messages (NPRM ¶¶23-25). Advances in technology are allowing telemarketers to reach far more consumers than in the past. With a simple mouse-click, telemarketers can activate automatic dialing equipment that floods the country with unwanted live calls as well as unsolicited prerecorded messages. The telephone records subpoenaed for one autodialing telemarketer revealed the business was using 47 lines to leave messages that lasted less than 30 seconds. Considering that the calls could be placed over at least a 14-hour period, the equipment could leave more than half a million calls per week. In some cases, consumers have claimed that they could not disconnect from the call when the automatic message was being left. The immense scope of this activity is merely one example of the capacity of autodialer technology to intrude upon the privacy of our residents. A shocking use of this technology was seen by various state attorney general offices last spring when many of their own phone lines were barraged by prerecorded messages inviting the called party to call an 800 number to claim a travel package.[108] Similar messages were left on consumers' home phones as well.

Currently, at least thirty-three states have statutes that regulate autodialed calls and/or prerecorded messages.[109] Attorneys General have utilized these statutes to bring enforcement actions against violators who were leaving unsolicited, prerecorded commercial messages.[110] The Attorneys

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[107] Order on Further Consideration, 12 FCC Rcd 4609, ¶6 (1997).

[108] The Attorneys General of Illinois, North Carolina, and Tennessee received a rash of prerecorded messages on many of their office telephone lines between March and August, 2002. The calling party invited the call recipient to telephone an 800 number to participate in Disney's 100th Anniversary celebration by visiting south Florida for a cost of $99 per person for three days.

[109] States with laws regulating commercial autodialed and/or prerecorded messages include Alaska, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming.

[110] See, for example, the actions by the North Carolina Attorney General: ***State ex rel Cooper*** v. ***Carper DryClean, Inc.***, 02 CVS 01247 (Wake County Superior Court), filed October 8, 2002; ***State ex rel. Cooper v.***

General have seen legal challenges waged against their state autodialer statutes, as well as the autodialer prohibition of the federal TCPA, on the grounds that the statutes are an illegal abridgement of the telemarketer's right to freedom of speech under the First Amendment."' However, both state and federal courts have found the challenges to be without merit."' Therefore, the force and effect of state statutes can and will be felt by abusive telemarketers if the states are left unfettered in their efforts to curb this form of telemarketing. The Attorneys General encourage the Commission to adopt rules that will enhance their enforcement efforts against these unwanted intrusions. The Attorneys General further encourage the Commission to engage in cooperative enforcement efforts on these matters with the states, but urge the Commission to avoid any efforts to preempt or block state action in this area.

C. PREDICTIVE DIALERS

The Commission seeks comment on predictive dialers (NPRM ¶¶15,26). Attorney General offices also have received complaints from consumers who are annoyed and frustrated when they answer phone calls which are silent on the other end. The silence is the result of a call placed by a predictive dialer system being "abandoned" because the telemarketer was not available to handle the call. The Commission correctly noted some of the problems with these devices (NPRM ¶15). The problems include the inability of the consumer to **ask** to be put on a do-not-call list, the annoyance of answering dead-air calls, the physical difficulty that senior citizens or the disabled may have in answering phones, and the fear that the call came from a potential burglar who is trying to find out if the resident is at home.

By setting some "acceptable" abandonment rate as the Direct Marketing Association suggests to its members (NPRM, n.101), the FCC would be blessing the interruptions that have contributed to the unprecedented consumer outrage leading to the current no-call database laws. Logically, persons engaged in telemarketing should not desire to alienate consumers. The consumers' time is just as valuable as that of the telemarketer. Accordingly, the Attorneys General strongly urge that

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Bluegreen Vacations Unlimited, Inc., 02CVS012207 (Wake County Superior Court), filed September 11,2002; *State ex rel. Cooper v. Live Wire Systems, Inc. and James P. Davis,* 02CVS01 1713 (Wake County Superior Court), filed August 30,2002; *State ex rel. Cooper v. Fax.com, Inc.*, 02 CVS 007053 (Wake County Superior Court), filed May 30,2002; and *State ex rel. Cooper v. Access Resource Services, Inc.*, 99CVS13248 (Wake County Superior Court), filed December 16, 1999. See **also** the action filed by the Illinois Attorney General: *People of the State of Illinois v. Live Wire Systems,* 2002-CH-484 (Sangamon County Circuit Court, Illinois), filed October 10, 2002.

[111] ***See*** *Bland v. Fessler,* D.C. No. CV-94-07275 (D. Cal. 1994); *Moser v. FCC,* 826 F. Supp. 360 (D. Or. 1993); *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995); *Minnesota v. Casino Marketing Group, Inc.,* 475 N.W.2d 505 (Minn. App. 1991), *aff'd,* 491 N.W.2d 882 (Minn. 1996).

[112] *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996), *cert. denied,* 519 U.S. 1009 (1996); *Moser v. FCC*, 826 F. Supp. 360 (D. Or. 1993), *rev'd by* 46 F.3d 970 (9th Cir. 1993), *cert. denied,* 515 U.S. 1161 (1995); *Van Bergen v.* Slate *of Minnesota,* 59 F.3d 1541 (8th Cir. 1995); *Minnesota v. Casino Marketing Group, Inc.,* 491 N.W.2d 882 (Minn. 1996).

a 0% rate of abandoned calls is the appropriate standard and should be the target and expectation of every company using a predictive dialer system.

D. ADEQUACY OF CURRENT DEFINITIONS

In paragraphs 23 and 24 of the NPRM, the Commission raises the issue of whether the current definitions in the TCPA and the Commission's rules should be redrafted in light of changes in technology. The Attorneys General believe that the current definition for automatic telephone dialing systems, which is "equipment which has the capacity to store and produce telephone numbers to be called using a random or sequential number generator to dial such numbers," appears to be sufficiently broad to withstand changes in technology. If the rules were modified at this point to specifically address the current technology, the rules would likely be outdated almost as soon as enacted due to the fast pace of the technical innovations in this field. Additionally, the case cited in fn.96 of the NPRM, *Kaplan v. Ludwig and Kustom Karpet Kleaners, Inc.,* was overruled by the Supreme Court of New York, Fourth Division."[113] The states can find no case in which a court has held that equipment using a computer database to dial numbers would not qualify as an "automatic telephone dialing system" under the TCPA.

E. TELEMARKETING CALLS TO WIRELESS TELEPHONE NUMBERS

The Commission seeks comment on issues related to telemarketing to wireless telephone numbers (NPRM ¶¶41-46). The Attorneys General believe that the Commission should prohibit all unsolicited commercial telemarketing calls that cause the recipient to incur a cost to receive the call. When a call is placed to a wireless telephone number, the recipient nearly always incurs a cost to receive the call. Such charge can be a per-minute charge or a reduction from a bucket of airtime minutes for which the recipient pays. As noted above, all telemarketing involves some cost-shifting in which the seller uses the potential customer's property (the telephone) to try to make a sale. In the case of wireless phones the cost-shifting is even greater because airtime charges are incurred by the potential customer. Several state legislatures regulate or have proposed regulation of commercial telemarketing calls to wireless phones.[114]

In addition to cost concerns, telemarketing to wireless telephone numbers can pose safety risks because wireless telephone calls are sometimes answered when the wireless telephone owner is

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[113] 286 A.D.2d 970 (N.Y. App. Div.), 730 N.Y.S.2d 765 (2001), *cert. denied,* ___ U.S. ___, 122 S. Ct. 2358 (2002).

[114] Arizona (Ariz. Rev. Stat. Ann. § 44-1278(B)(3)); California (Cal. Bus. and Prof. Code § 17590, *et seq.*); Connecticut (Conn. Gen. Stat. § 52-570c); Illinois (Ill. Pub. Act No. 92-0795 (Aug. 9, 2002); S.B. 1637, 92nd G.A. (April 4,2002)); Kentucky (Ky. Rev. Stat. § 367.46951); Maine (10 Me. Rev. Stat. Ann. § 1498 (prohibitions on calls placed by an automatic dialing device includes wireless telephone numbers); Minnesota (Minn. Stat. § 325E.26-.31 (2000)); New Jersey (2002 N.J. S.B. 153, 210th Legislature (September 26, 2002)); New York (NY CLS Gen. Bus. § 399-z (2002)); Tennessee (Tenn. Code Ann. § 47-18-1526(b)); Wyoming (Wyo. Stat. Ann. § 40-12-302(b)).

engaged in activities in which there is some risk associated with using a telephone, such as driving or working in industrial settings. Even though government safety officials caution against using a wireless telephone in such situations, the Commission should recognize the reality that some consumers will do so despite the risks. One reason why wireless users are more likely to answer their telephones is the beliefthat calls to wireless phones are more important and will not be telemarketing calls. The Commission should ensure that the consumer's expectations in this respect are met.

F. "INFORMATION ONLY" CALLS

The Commission **seeks** comment on artificial and prerecorded messages that (1) purport to offer "free" goods or services, (2) purport to contain "information only," and (3) seek people to help sell or market a company's products, such as a "help wanted" message (NPRM ¶¶30-32).[115]

With respect to each of those examples, the application of the TCPA must turn not on the telemarketer's own characterization of the prerecorded message, but on the actual purpose of the initial prerecorded or artificial message. Ifthe purpose ofthe commercial prerecorded message is to promote or sell goods or services, then it must be subject to the TCPA. This should not change simply because a marketer thinly disguises this purpose by claiming to provide "information only," claiming to offer free goods, or claiming to seek distributors for its products. If marketers could circumvent the TCPA merely by communicating "information only" or "free" goods in the prerecorded message, and saving the real sales pitch for the consumer's call in response to the message, the ban on prerecorded messages could be avoided so easily as to become a nullity. As discussed below, there can be no dispute that the TCPA and the Commission's rules -- in their current form -- already prohibit prerecorded messages that seek to sell or promote goods or services, including the examples cited by the Commission in paragraph 31.[116]

As the Commission noted in the NPRM, "the [TCPA] and our rules clearly apply *already* to messages that are predominantly commercial in nature, and that [the Commission] will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself simply by inserting purportedly 'non-commercial' content into that message" (NPRM ¶33). That same approach demonstrates that commercial sellers cannot immunize prerecorded messages from the TCPA by claiming that the message lacks an "unsolicited advertisement." Congress intended that exemptions from the TCPA must be evaluated based on substance, not form.[117] The federal courts have followed that instruction, and declined to allow companies to avoid

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[115] ***See*** 47 C.F.R. § 64.1200(c)(1) & (2).

[116] Further, to the extent marketers have used those techniques (such as "information only" calls) to try to avoid the restrictions of Section 64.1200(e) (do-not-call list procedures), this comment also applies to show why those TCPA rules also cannot be avoided by superficial characterization of the purpose of calls.

[117] With respect to the exemption for callers with an established business relationship, Congress stated: "The Committee intends this (test) to be one of substance and not one of form." H.R. Rep. 102-317, * **15**, 102nd

the TCPA by superficially claiming an exemption.[118] The TCPA itself makes clear that application of the statute should turn on the *purpose* of the phone contact."' Accordingly, the TCPA's ban on commercial prerecorded messages already applies to messages designed to sell goods or services, even if the message purports to be "information only" or offer free goods.

Nonetheless, it appears that certain telemarketers may attempt to circumvent the TCPA by improperly characterizing calls as "noncommercial" or by claiming the absence of an "unsolicited advertisement." For example, one for-profit seller of communications services has communicated prerecorded messages to residential numbers. The prerecorded message explains that an exciting launch of a revolutionary new product will soon take place, claims that the new product offers an opportunity to make a six-figure income, and encourages the recipient to attend a local meeting to learn about the opportunity. At the meeting, the seller encourages attendees to purchase an inventory of communications products for purposes of resale. In those circumstances, notwithstanding the purported offer of a business opportunity, the purpose of the prerecorded message is to sell commercial goods. Although the TCPA prohibits such commercial prerecorded messages, the commercial seller apparently likens the prerecorded message to a "help wanted" advertisement.

That example, like the "information only" and "free goods" messages noted by the Commission in the NPRM, highlights that certain telemarketers appear to be trying to exploit some perceived ambiguity with respect to the exemption in Section 64.1200(c)(2). The Commission could end such efforts to circumvent the TCPA and the Commission's rules by clarifying the definition of "unsolicited advertisement" in Section (f)(5). The Attorneys General recommend that the Commission import the purpose-based framework of the "telephone solicitation" definition to the "unsolicited advertisement" definition. The term "unsolicited advertisement" should include *any material communicated for the purpose of encouraging the purchase or rental of; or investment in property, goods or services.* To the extent telemarketers perceived any ambiguity, this clarification would better serve consumers and business by clarifying that the TCPA applies to calls whose purpose is to sell something -- including commercial calls in the guise of "information only" calls, "free" give-aways, phony surveys, or "help wanted" calls.

Congress (1991), 1991 WL 245201

[118] *See Kenro, Inc. v. Fax Daily Inc.*, *962* F. Supp. 1162, 1171-72 (S.D. lnd. 1997) (refusing to accept that defendant's unsolicited faxes were non-commercial; although faxes contained editorial content in addition to advertisements, the purpose of the editorial content was to evade the TCPA); *Texas v. American Blastfax*, Inc. 121 F. Supp. 2d 1085, 1089 (W.D. Tex. 2000) (refusing to exempt a fax broadcaster who claimed it merely sent faxes for its clients, because "[i}t would circumvent the purpose of the TCPA").

[119] *See* 47 U.S.C. § 227(a)(3) & 47 C.F.R. § 64.1200(f)(3) ("telephone solicitation" includes "any telephone call or message *for the purpose of encouraging* the purchase or rental of, or investment in, property, goods or services") (emphasis supplied).

G. THE EXEMPTION FOR PRERECORDED MESSAGES TO RESIDENCES BY OR ON BEHALF OF TAX-EXEMPT NONPROFIT ORGANIZATIONS

The Commission specifically seeks comment on "calls made jointly by nonprofit and for-profit organizations and whether they should be exempt from the restrictions on telephone solicitations and prerecorded messages" (NPRM *733)*. Currently there is an exemption for such prerecorded calls or messages "by, or on behalf of. . . a tax-exempt nonprofit organization." 47 C.F.R. § 64.1200(c)(4). *See also* Section 64.1200(f)(3) (excluding same from definition of "telephone solicitation" generally and thus from the do-not-call restrictions in Section 64.1200(e)); 47 U.S.C. § 227(a)(3)(C).

Prerecorded messages or telephone solicitations that serve to benefit for-profit companies, for instance, by proposing a commercial transaction with proceeds payable to a for-profit (whether in whole or in part), are *not* calls or messages "by or on behalf of tax-exempt nonprofit organizations." Such calls or messages are, and should remain, subject to the restrictions of the TCPA. No revision is necessary to apply the TCPA to calls or messages that solicit money payable to a for-profit. However, should the Commission determine it beneficial to clarify that the TCPA applies to marketing calls or messages by for-profits and to joint marketing efforts by for-profits and nonprofits, the exemption should be clarified to expressly not apply to calls or messages soliciting money payable to for-profit entities. If so clarified, the exemption in Section (c) should exempt:

> *a call or message by, or on behalf of, a caller. . . (4) Which is a tax-exempt nonprofit organization. This exemption shall not apply to calls or messages that solicit money payable to a person other than the tux-exempt nonprofit organization placing the call or message, or on whose behalf the call or message is placed.*

If the Commission deems a clarification beneficial, the same proviso ("This exemption. . .") should be added to Section 64.1200(f)(3)(iii) (defining telephone solicitations to exclude calls "by or on behalf of a tax-exempt nonprofit organization").

Currently, some for-profit telemarketers use prerecorded messages to solicit money payable to the *for-profit* company, for goods and/or services sold by the for-profit company. We know that certain of these for-profit telemarketers, when investigated or challenged for these violations of the TCPA, claim protection under the nonprofit exemption. These for-profit telemarketers have aligned with nonprofit organizations (typically by contract), so that the telemarketers claim to be placing prerecorded commercial messages "on behalf of' the tax-exempt nonprofit organization. However, although claiming that the prerecorded message is on behalf of the nonprofit (and thus purportedly exempt from the TCPA), in the telemarketing transaction generated by the message, the for-profit telemarketers solicit money *payable to the for-profit company*, not the nonprofit, for goods and/or services *sold by the for-profit company.* Such a prerecorded commercial message that generates a sale of goods or services, by a for-profit, cannot conceivably be entitled to an exemption under 47 C.F.R. § 64.1200(c)(4).

Yet in at least the field of "credit counseling,"[120] such TCPA violations have occurred on a massive scale. Most credit counselors are nominally tax-exempt nonprofit corporations (although many charge substantial monthly fees). Some nonprofit credit counselors have aligned with for-profit telemarketers that solicit new clients, and some of those telemarketers use prerecorded messages to contact prospects. By way of example, one for-profit telemarketer has communicated prerecorded voice messages to residential phone numbers, promising to reduce interest rates and save consumers money repaying their credit card debt. The prerecorded message did not disclose how the savings would be achieved and did not identify any nonprofit organization. If a caller responded to the 1-800 number on the message, the caller reached the for-profit call center. In the sales pitch that followed, the telemarketer described credit counseling services offered by a nonprofit organization. However, the telemarketer solicited "enrollment fees" (between $199-$499), payable entirely to the for-profit company. In a later version of its sales pitch, which also originated with a similar prerecorded message, the for-profit telemarketer sold "educational" materials, for hundreds of dollars. Once again, all money solicited was payable to the for-profit telemarketing company, not the nonprofit. Consumers interested in nonprofit credit counseling would be referred to anonprofit credit counselor, but only after they paid hundreds of dollars to the for-profit marketing company.

For the for-profit telemarketer to claim the nonprofit exemption for the prerecorded message -- when it solicits money payable entirely to the for-profit -- is unsupportable. To so exalt form over substance would allow unfettered abuse of the nonprofit exemption[121] and undermine an essential purpose of the TCPA.[122] Put simply, when a prerecorded message solicits money payable to a for-profit, not the exempted nonprofit, the message is not "on behalf of a nonprofit" and is not exempt from the TCPA.

The Attorneys General believe that the current exemption for tax-exempt nonprofit organizations generates no ambiguity with respect to for-profit orjointly sponsored marketing. Calls or messages that generate commercial sales for for-profit entities are subject to the TCPA. However, should the Commission determine it beneficial to clarify the nonprofit exemption, the Commission

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[120] Credit counselors, or debt adjusters, typically collect monthly payments from consumers and distribute payments to the consumer's creditors, after seeking to negotiate more favorable terms for the consumer, for instance, reduced interest rates or the waiver of penalties or late fees.

[121] Although no court has interpreted the TCPA nonprofit exemption, courts interpreting other TCPA exemptions have focused on substance over form, and declined to allow companies to avoid the TCPA by abusing its exemptions. ***See Kenro,*** *Inc. v. Fax* ***Daily*** *Inc.,* 962 F. Supp. 1162, **1171-72** (S.D. Ind. **1997)** (refusing to accept that defendant's unsolicited faxes were non-commercial; although faxes contained editorial content in addition to advertisements, the purpose of the editorial content could have been to evade the TCPA); ***Texas v. American Blast*** *Far, Inc.* 121 F. Supp. 2d 1085, 1090 (W.D. Tex. **2000)** (refusing to exempt a fax broadcaster who claimed it merely sent faxes for its clients, because "[i]t would circumvent the purpose ofthe TCPA"). As stated above, Congress declared: "The Committee intends this [test] to be one of substance and not one of form." H.R. Rep. 102-317, *15, 102nd Congress (1991), **1991 WL 245201**.

[122] *See* TCPA Order, **7** FCC Rcd **8773-74, ¶40** (TCPA primarily protects individuals from "unrestricted commercial telemarketing activity").

should reinforce that the exemption expressly does *not* apply to calls soliciting money payable to for-profit entities, rather than payable to the tax-exempt nonprofit organization.

This clarification would reinforce -- consistent with the legislative and regulatory history -- that the nonprofit exemption from the ban on prerecorded messages extends only to nonprofit~.'~~ To allow for-profits to continue to solicit money using prerecorded commercial messages undermines aprecise purpose of the TCPA: to restrict commercial use of invasive prerecorded messages. It also, of course, would provide an unfair advantage to those for-profits that sell their products using banned prerecorded commercial messages, in relation to for-profit competitors that comply with the TCPA. In the NPRM, the Commission noted that "the [TCPA] and our rules clearly apply already to messages that are predominantly commercial in nature, and that [the Commission] will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself simply by inserting purportedly 'non-commercial' content into that message" (NPRM, ¶33).[124] That same ideal should govern when for-profit entities **seek** to align with nonprofits

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[123] Congress authorized the Commission to exempt: (I) non-commercial calls and (2) calls that the Commission determines (i) will not adversely affect the privacy rights that the TCPA is intended **to** protect *and* (ii) do not include the transmission of any unsolicited advertisement. 47 U.S.C. § 227(b)(2)(B). ***See*** 137 Cong. Rec. S18781-02, 102ND Cong., 1st Sess. (1991) 1992 WL 106397 (Cong. Rec.) (statement of Senator Hollings) ("The bill gives the FCC authority to exempt from these restrictions calls that are not made for a commercial purpose and categories of calls that . . . do not invade privacy rights."). Congress mentioned examples of certain telemarketing it intended to allow, such as calls "from their alma mater, from their favorite charity, from their newspaper or magazine about a lapsed subscription." 137 Cong. Rec. HI1314 (statement of Rep. Richardson), 102ND Cong., I" Sess., (1991), 1991 WL 250340 (Cong. Rec.). The Commission exempted prerecorded messages by nonprofits *because* it deemed them non-commercial: "[W]e conclude that tax-exempt nonprofit organizations should be exempt from the prohibition on prerecorded message calls to residences *as non-commercial calls.*" TCPA Order, at 8774, ¶40 (emphasis supplied); ***see id.*** **75.** The Commission thus exempted nonprofit messages, such as messages seeking charitable solicitations. There is no basis in the legislative or regulatory history to extend that exemption to for-profits in any manner. Indeed, exempting commercial messages that benefit for-profits would fall outside the regulatory authority delegated by Congress because such messages are commercial and they adversely affect the residential privacy rights that the TCPA is intended to protect. ***See*** 47 U.S.C. § 227(b)(2)(B).

[124] With respect to prerecorded and artificial messages, paragraph 33 of the NPRM raises the issue whether the nonprofit exemption from the ban on prerecorded messages should apply to nonprofit prerecorded messages that are commercial in nature, *i.e.*, that promote the sale of goods or services. Although the nonprofit exemption from "telephone solicitation" in Section 64.1200(f)(3) (exempting nonprofits from the Section (e)'s telemarketing restrictions) contemplates telemarketing calls by nonprofits selling goods or services, the nonprofit exemption from the ban on prerecorded messages is different. ***See*** 47 C.F.R. § 64.1200(a)(2) & (c)(4). ***See*** *also* 47 U.S.C. § § 227(a)(3) (defining "telephone solicitation"); 227(b)(1)(B) (banning commercial "telephone call[s]" using prerecorded messages) & 227(b)(2)(B) (authorizing FCC to craft exemptions to prerecorded message ban). With respect to prerecorded messages, the Commission exempted *non-commercial* messages by nonprofits. ***See*** TCPA Order, ¶ 5 ("we exempt from the prohibition on prerecorded and artificial voice message calls to residences . . . *non-commercial calls* by tax-exempt nonprofit organizations.") (emphasis supplied); *see also* NPRM ¶ 33 ("the Commission concluded that calls by tax-exempt nonprofit organizations also should be exempt from the prohibition on prerecorded messages to residences as non-commercial."). This made sense because prerecorded messages selling goods or services are commercial and invade residential privacy, whether the sales messages are generated by a nonprofit or a for-profit. ***See*** 47 U.S.C. § 227(b)(2)(B). To address the issue of joint for-profitinonprofit

in order to circumvent the TCPA: prerecorded messages that propose commercial sales that benefit for-profit companies are predominantly commercial, and for-profits cannot immunize those commercial messages because they are associated with, or share proceeds with, nonprofit organizations.

IV. CONCLUSION

The Attorneys General continue to view unsolicited telemarketing calls as a serious problem affecting many consumers, and an invasion of privacy when consumers desire not to be contacted in their homes. Unwanted telemarketing calls are a continuing intrusion into the privacy of those consumers who do not wish to receive such calls. That consumers strongly desire sovereignty over their homes against unwanted telemarketing intrusions is abundantly clear. Based on the responses in states that have adopted do-not-call database systems, the Attorneys General encourage the Commission to anticipate a significant response to a national database, particularly from residents of states that have not yet implemented their own databases. We urge the Commission to view consumers' desire for privacy in their homes as paramount as it pursues the establishment of a national do-not-call registry and works with our offices to ensure a consumer-friendly database system that respects the sovereignty of states in enacting and enforcing their own laws.

We also encourage the Commission to consider our recommendations to enhance the rules governing unsolicited advertising and proscribe the deceptive practices of fax broadcasters, predictive dialers, autodialers, and joint for-profithot-for profit arrangements. In addition, we urge the Commission to treat information-only calls as solicitations and ban telemarketing calls to cellular telephones. By augmenting and improving the rules governing unsolicited advertising, the Commission would further our mutual consumer protection interests.

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marketing raised by the Commission, with respect to prerecorded messages, the Commission could clarify the nonprofit exemption consistent with its regulatory history. For prerecorded messages (not all "telephone solicitations"), the Commission could clarify that the nonprofit exemption in Section (c)(3) applies only to prerecorded message calls *made by or on behalf of tax-exempt nonprofit organizations, provided that such calls do not propose or solicit the sale of goods or services.* This clarification is consistent with the Commission's original exemption and advances an essential purpose of the TCPA: to restrict *commercial* prerecorded messages. This clarification also would address the issue (discussed above) of for-profit companies that use prerecorded messages to sell their own goods or services but wrongly seek exemption from the TCPA because they are somehow aligned with a nonprofit.